UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ERIC LUSH, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Civil No. 03-156-P-H***
	)	
	)	
F/V TERRI and RUTH, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT

Defendants F/V Terri and Ruth ("Vessel") and Ruth Ann Stables, Inc. ("Stables, Inc.") (both, "Defendants") move for summary judgment against plaintiff Linda Stewart as to all three counts of the instant verified complaint in admiralty and against plaintiff Eric Lush (together with Stewart, "Plaintiffs") as to Counts II and III. *See* Defendants' Motion for Partial Summary Judgment ("Defendants' S/J Motion") (Docket No. 31) at 1; Verified Complaint in Admiralty ("Complaint") (Docket No. 1) ¶¶ 7-32. Stewart cross-moves for summary judgment as to Count I. *See* Memorandum in Support of Plaintiff Stewart's Motion for Summary Judgment ("Plaintiffs' S/J Motion") (Docket No. 33); Complaint ¶¶ 7-9.[1] For the reasons that follow, I recommend that the court deny the Defendants' motion as to Count I and grant it as to Counts II and III and grant Stewart's motion.

[1] Although Docket No. 33 is titled a "memorandum," I construe it as a motion for summary judgment with incorporated

(*continued on next page*)

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

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memorandum in support thereof.

To the extent that parties cross-move for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2720, at 336-37 (1998).

II. Factual Context

The parties' statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56, reveal the following relevant to this recommended decision:[2]

Stables, Inc. has owned the Vessel since 1985. Plaintiffs' Statement of Material Facts in Support of Plaintiff Stewart's Motion for Summary Judgment ("Plaintiffs' SMF") (Docket No. 34) ¶¶ 1-2; Defendants' Opposing Statement of Material Facts ("Defendants' Opposing SMF") (Docket No. 39) ¶¶ 1-2. James Finley is president and financial officer of Stables, Inc. and its sole shareholder. *Id.* ¶¶ 3-4. He therefore is the human representative of the Defendants. Defendants' Statement of Material Facts ("Defendants' SMF"), attached to Defendants' S/J Motion, ¶ 1; Plaintiffs' Opposing Statement of Material Facts ("Plaintiffs' Opposing SMF") (Docket No. 45) ¶ 1.

In October 2000 the Vessel was berthed at Custom House Wharf in Portland, Maine. Plaintiffs' SMF ¶ 5; Defendants' Opposing SMF ¶ 5. The Vessel did not fish from September 2000 through November 2000. *Id.* ¶ 6. In October 2000 Finley met with Lush, a fisherman who had previously fished

[2] The parties properly submitted separate statements of material facts in support of and in opposition to each summary-
(*continued on next page*)

on the Vessel, to discuss its sale. *Id*. ¶¶ 7-8. As a result of the discussion, Finley agreed to sell the Vessel to Lush. *Id*. ¶ 9.

Finley arranged to have the Vessel surveyed by Mike Monroe. *Id*. ¶ 10. The survey was commissioned to determine the value of the Vessel for purposes of the sale. *Id*. ¶ 11. The Monroe survey valued the Vessel at $90,000 if repairs were completed. Plaintiffs' SMF ¶ 12; Deposition of Michael J. Monroe ("Monroe Dep."), attached to Defendants' Notice of Attachments ("Defendants' Notice") (Docket No. 44), at 48-49.[3] The Monroe survey specified repairs needed before the Vessel could be returned to service as a fishing vessel. Plaintiffs' SMF ¶ 13; Defendants' Opposing SMF ¶ 13. Monroe did not attempt to value any fishing licenses or permits associated with the Vessel. Defendants' SMF ¶ 6; Plaintiffs' Opposing SMF ¶ 6.

After receiving the Monroe survey, Finley agreed to sell the Vessel to Lush for $90,000. Plaintiffs' SMF ¶ 15; Defendants' Opposing SMF ¶ 15. Lush agreed to purchase the Vessel for $90,000. *Id*. ¶ 16. After agreement was reached, Lush paid $5,000 as a down payment on the purchase price. *Id*. ¶ 17. At the time the purchase agreement was reached, Lush agreed to become the captain of the Vessel until he purchased it. *Id*. ¶ 18. After the agreement was reached, Lush performed and supervised repairs to the Vessel. *Id*. ¶ 19. He served as its captain and was responsible for its operation from October 2000 until approximately May 2003. *Id*. ¶ 20. From the time the agreement was reached until January 2001, when the Vessel was repaired, Lush supervised and performed repairs at the Maine Shipyard & Marine Railway

judgment motion; however, inasmuch as those statements substantially overlap, in the interest of avoiding needless repetition I have melded them into one unified factual recitation.

[3] The Plaintiffs characterize the repairs as "substantial," but that characterization is not fairly supported by the citation given and is in any event disputed by the Defendants, *see* Defendants' Opposing SMF ¶ 12; Monroe Dep. at 48-49, 65, as a result of which I disregard it for purposes of the cross-motions.

in South Portland ("Shipyard") and at its berth at the Custom House Wharf. *Id.* ¶ 21. Finley knew Lush was conducting repairs on the Vessel during the period from October 2000 to January 2001. *Id.* ¶ 24.

The monies that Lush spent on repairing and maintaining the Vessel were obtained through a loan from his girlfriend, Stewart. Defendants' SMF ¶ 8; Plaintiffs' Opposing SMF ¶ 8. The initial repairs to the Vessel performed at the Shipyard cost $12,354.55. Plaintiffs' SMF ¶ 26; Defendants' Opposing SMF ¶ 26. Stewart paid the Shipyard $12,354.55 for repairs performed to the Vessel and use of its railway. *Id.* ¶ 27.[4] While the Vessel was being repaired, Lush hired Joe St. Pierre to work on it. *Id.* ¶ 29. Stewart advanced Lush $7,000 to pay St. Pierre for repair work he performed on the Vessel. *Id.* ¶ 30. Lush paid St. Pierre $7,000 for the work he performed repairing the Vessel. *Id.* ¶ 31. While the Vessel was being repaired, work was performed by Bill Hubble under Lush's supervision. *Id.* ¶ 32. Stewart advanced Lush $3,000 to pay Hubble for work performed repairing the Vessel. *Id.* ¶ 33. Lush paid Hubble $3,000 for work he performed repairing the Vessel. *Id.* ¶ 34. While the Vessel was being repaired, work was performed by Jerome Sarofeen under Lush's supervision. *Id.* ¶ 35. Stewart advanced Lush $1,000 to pay Sarofeen for work he performed repairing the Vessel. *Id.* ¶ 36. Lush paid Sarofeen $1,000 for work he performed repairing the Vessel. *Id.* ¶ 37. Stewart paid Sarofeen an additional $500 for repair work at the request of Lush. *Id.* ¶ 38. While the Vessel was being repaired, work was performed by Jim Furbush under Lush's supervision. *Id.* ¶ 39. Stewart advanced Lush $2,500 to pay Furbush for work he performed repairing the Vessel. *Id.* ¶ 40. Lush paid Furbush $2,500 for work he performed repairing the Vessel. *Id.* ¶ 41. While the Vessel was being repaired, work was performed by Edgar Googins under Lush's

[4] The parties dispute whether Finley was aware that Stewart had arranged to pay the Shipyard for repairs to the Vessel. *Compare* Plaintiffs' SMF ¶ 28; Affidavit of Linda Stewart in Support of Her Motion for Summary Judgment ("Stewart Aff."), attached to Plaintiffs' S/J Motion, ¶ 15; Affidavit of Plaintiff Eric Lush in Support of Plaintiff Stewart's Motion for Summary Judgment ("Lush Aff."), attached to Plaintiffs' S/J Motion, ¶ 14 *with* Defendants' Opposing SMF ¶ 28; (*continued on next page*)

supervision. *Id*. ¶ 42. Stewart advanced Lush $1,500 in cash to pay Googins for repair work he performed on the Vessel. *Id*. ¶ 43. Lush paid Googins $1,500 for work he performed on the Vessel. *Id*. ¶ 44.

From October 2000 until repairs were completed to the Vessel under his supervision, Lush purchased equipment and supplies he used in repairing the Vessel. *Id*. ¶ 45. From October 2000 to January 2001 Lush purchased equipment and supplies from the following vendors in the amounts specified: Rite Aid, $54.64; PRC Industrial, $64.93; VIPAuto Discount, $48.23; Portland Glass, $392.89; Handyman Rental, $375.45; Dulux Paint Centers, $88.43; Grinnel Fire Protection, $74.52; K.L. Jack & Co., $20.31; True Value Hardware, $93.46; Shopper's Hardware, $115.31; W.L. Blake, $68.03; American Steel, $1,334.74; NAPA Auto Parts, $58.17; Hamilton Marine, $978.28; Home Depot, $1,660.95; Maine Hardware, $646.54; Portland Welding Supply, $1,415.20; Hertz Equipment Rental, $963.20; Topsham Rental, $50.00; Harbor Propeller, $390.00; Goldstein Steel, $78.75; Chase Leavitt, $545.38; WalMart, $20.84; Shop and Save, $2.98; Maine Paint Service, $13.10; Advantage Gas & Tools, $696.33; Taylor Made Signs, $100.00; New England Detroit Diesel, $81.33; N.C. Hunt, Inc., $91.13; Marriner Lumber, $9.00; and Sears Auto Center, $171.09. *Id*. ¶ 46. All the equipment and supplies purchased from vendors listed in the preceding paragraph were used in the repair of the Vessel. Plaintiffs' SMF ¶ 47; Lush Aff. ¶ 62.[5]

Deposition of James J. Finley, attached to Defendants' Notice, at 92.

[5] The Defendants dispute this, citing to an affidavit in which Finley questions several of the listed expenditures. *See* Defendants' Opposing SMF ¶ 47; Supplemental Affidavit of James Finley ("Suppl. Finley Aff."), attached to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment ("Defendants' S/J Opposition") (Docket No. 38), ¶ 2. However, as the Plaintiffs contend, the Defendants do not effectively controvert the statement. *See* Plaintiffs' Reply to Defendant's [sic] Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment ("Plaintiffs' S/J Reply") (Docket No. 46) at [8]-[9]. The Defendants dispute various expenditures on four grounds: that (i) Finley is unable to verify that some items related to Vessel repair, (ii) certain items were not found aboard the Vessel, (iii) Finley is unaware of any use for some of the items on fishing vessels, and (iv) to Finley, the quantity of certain items (*continued on next page*)

Finley was aware that Lush was purchasing equipment and supplies for repairs to the Vessel from October 2000 until it resumed fishing in January 2001. Plaintiffs' SMF ¶ 48; Defendants' Opposing SMF ¶ 48. Finley authorized Lush to purchase the supplies needed to repair the Vessel. Plaintiffs' SMF ¶ 49; Lush Aff. ¶ 7.[6] Lush asked Stewart to advance the funds needed to purchase equipment and supplies he used for the repair of the Vessel. Plaintiffs' SMF ¶ 50; Defendants' Opposing SMF ¶ 50. Finley was aware that Stewart was advancing the funds to purchase equipment and supplies to repair the Vessel and had no objection to her doing so. *Id*. ¶ 51.[7] In January 2001 Stewart wrote Finley apologizing for late payments she made to Portland Welding. *Id*. ¶ 53.[8] Stewart paid $38,562.44 for labor, supplies and equipment for supplies, services and repairs for the Vessel before it resumed fishing in 2001. Plaintiffs' SMF ¶ 55; Stewart Aff. ¶ 59.[9]

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purchased seems excessive. *See* Defendants' Opposing SMF ¶ 47; Suppl. Finley Aff. ¶ 2. With respect to the latter two points, neither of the two Finley affidavits submitted in connection with the instant motions establishes that Finley has any expertise on the subject of repairs to fishing vessels. *See generally* Affidavit of James Finley ("Finley Aff."), attached to Defendants' S/J Motion; Suppl. Finley Aff. Nor does Finley explain the basis for those beliefs. *See generally id*. "[C]onclusory allegations, improbable inferences, and unsupported speculation are insufficient to defeat summary judgment." *Magarian v. Hawkins*, 321 F.3d 235, 240 (1st Cir. 2003) (citation and internal quotation marks omitted). As to the first point (that Finley is unable to verify certain expenditures), the mere fact that a party lacks sufficient information to controvert a point does not suffice to raise a trialworthy issue. Finally, as to the second point, the Defendants rely on what amounts to an improbable inference: that because Finley has been unable to locate certain items aboard the Vessel, those items never were purchased in connection with Vessel repairs made several years ago. The items could be missing for any number of reasons (for example, that they were lost, they malfunctioned or they are not the sort of item that is kept on board after usage).

[6] The Defendants qualify this statement, asserting that while Finley did authorize Lush to purchase supplies needed to repair the Vessel, he authorized him merely to make purchases on his own personal credit for the benefit of the Vessel, not to make those purchases on the credit of the Vessel itself. Defendants' Opposing SMF ¶ 49; Suppl. Finley Aff. ¶ 3.

[7] The parties dispute whether, in December 2000, Finley urged Stewart to pay for supplies provided to the Vessel by Portland Welding. *Compare* Plaintiffs' SMF ¶ 52; Stewart Aff. ¶ 63 *with* Defendants' Opposing SMF ¶ 52; Suppl. Finley Aff. ¶ 5.

[8] The Plaintiffs' further statement that Finley admits Stewart is entitled to credit for money she advanced to repair the Vessel, *see* Plaintiffs' SMF ¶ 54, is disregarded inasmuch as it is neither admitted nor fairly supported by the citation given.

[9] The Defendants dispute this statement, *see* Defendants' Opposing SMF ¶ 55; however, they do not effectively controvert it inasmuch as they rely on paragraph 47 of their opposing statement of material facts, which I have found to be ineffective in raising a trialworthy factual issue. I note that, by my calculations, Stewart's itemized expenses add up to $38,557.76, which is $4.68 less than the claimed total of $38,562.44. However, inasmuch as the Defendants do not effectively controvert this statement, it is deemed admitted per Local Rule 56.

Stewart was at all relevant times Lush's girlfriend. Defendants' Supplemental Statement of Material Facts ("Defendants' Suppl. SMF") (Docket No. 40) ¶ 1; Plaintiffs' Response to Defendants' Supplemental Statement of Material Facts ("Plaintiffs' Reply SMF") (Docket No. 47) ¶ 1. She did not have any direct agreement or relationship with the Defendants. *Id*. ¶ 2. Her agreement was with her boyfriend, Lush. *Id*. The substance of that agreement was that she would lend him the money to fix up the Vessel. *Id*. Stewart did not furnish repairs, supplies, towage or other necessaries to the Vessel; rather, she merely furnished monies to its captain, Lush. Defendants' Suppl. SMF ¶ 4; Deposition of Linda S. Stewart ("Stewart Dep."), attached to Defendants' S/J Motion, at 13.[10] Stewart did not participate in the management or control of the Vessel. Plaintiffs' Supplemental Statement of Material Facts (Docket No. 48) ¶ 2; Stewart Aff. ¶ 6.

Stewart claims that she was neither an owner nor agent of the Vessel. Defendants' Suppl. SMF ¶ 5; Plaintiffs' Reply SMF ¶ 5. She signed a customer information sheet from the Shipyard on November 11, 2000 in which she represented to the vendor that she was authorized to bind the vessel and its owner. Defendants' Suppl. SMF ¶ 6; Maine Shipyard & Marine Railway Customer Information sheet, marked as Plaintiff's Exh. 3, attached to Plaintiffs' S/J Motion.[11] In a letter dated January 23, 2001 Stewart acknowledged that she was herself involved in the deal with the Vessel. Defendants' Suppl. SMF ¶ 7; Letter dated January 25, 2001 from Linda Stewart to Jim Finley, marked as Plaintiff's Exh. 42, attached to Plaintiffs' S/J Motion.[12] Stewart wrote checks to vendors of goods and services to the Vessel that read,

[10] The Plaintiffs qualify this statement, noting, *inter alia*, that Stewart also made payments directly to laborers and boatyards. *See* Plaintiffs' Reply SMF ¶ 4; *see also* Plaintiffs' SMF ¶¶ 27, 38; Defendants' Opposing SMF ¶¶ 27, 38.

[11] The Plaintiffs qualify this statement, asserting that Stewart signed this sheet to assure payment of repair bills. Plaintiffs' Reply SMF ¶ 6; Stewart Aff. ¶ 14.

[12] The Plaintiffs attempt to qualify this statement, *see* Plaintiffs' Reply SMF ¶ 7; however, the qualification is unsupported by any record citation and is on that basis disregarded.

"L.S. Stewart DBA Fishing Vessel." Defendants' Suppl. SMF ¶ 8; Plaintiffs' Reply SMF ¶ 8. Stewart had telephonic and written communications with Finley regarding debts associated with the Vessel and purchasing the Vessel. *Id*. ¶ 9. Beginning in October 2000 Lush told people that he had reached a deal to buy the Vessel. *Id*. ¶ 11.[13]

The Defendants never agreed in writing or anywhere else to pay Stewart the debt that Lush owed her. Defendants' SMF ¶ 11; Plaintiffs' Opposing SMF ¶ 11. Stewart's understanding of the arrangement with Finley was that perhaps in three years' time Lush would be able to purchase the Vessel; the arrangement was expected to last well beyond one year. *Id*. ¶ 12. The arrangement to allow Lush to captain the Vessel and see if he could make enough money to buy it was never expected to take any less than one year. Defendants' SMF ¶ 13; Finley Aff. ¶ 10.[14] There never was actual agreement on all of the terms of any deal, including time for payment, interest and rent. Defendants' SMF ¶ 14; Finley Aff. ¶ 11.[15] No agreement between the Plaintiffs and the Defendants was ever reduced to writing. Defendants' SMF ¶ 15; Plaintiffs' Opposing SMF ¶ 15.

III. Analysis

A. Count I: Maritime Lien (Stewart)

In Count I of their complaint, the Plaintiffs allege that they acquired a maritime lien against the Vessel when they supplied labor and materials, parts and equipment for its repair. Complaint ¶¶ 7-9. Stewart seeks summary judgment as to this claim, seeking to enforce her maritime lien for necessaries provided to

[13] The parties dispute whether Finley, on behalf of the Defendants, ever authorized the services rendered by the Shipyard or agreed to extend the Vessel's credit for such repair work. *Compare* Defendants' Suppl. SMF ¶ 10; Suppl. Finley Aff. ¶¶ 3-4 *with* Plaintiffs' Reply SMF ¶ 10; Lush Aff. ¶ 14.

[14] The Plaintiffs purport to qualify this statement, asserting that the purchase was to have occurred earlier if Lush could afford the payment, *see* Plaintiffs' Opposing SMF ¶ 13; however, the qualification is disregarded on the basis that it is not fairly supported by the citation given.

the Vessel in the amount of $38,562.44 plus interest and costs. *See* Plaintiffs' S/J Motion at 1-2.[16] The Defendants oppose summary judgment in Stewart's favor and cross-move for summary judgment against her as to Count I on the basis that she acquired no enforceable maritime lien against the Vessel. *See* Defendants' S/J Motion at 1-2; *see generally* Defendants' S/J Opposition.[17] The Plaintiffs have the better of the argument.

Per 46 U.S.C. § 31342, "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner . . . (1) has a maritime lien on the vessel; (2) may bring a civil action in rem to enforce the lien; and (3) is not required to allege or prove in the action that credit was given to the vessel." 46 U.S.C. § 31342(a). Persons presumed to have authority to procure necessaries for a vessel include (i) the master and (ii) officers or agents appointed by the owner or by an agreed buyer in possession of the vessel. *Id*. § 31341.

As the Defendants observe, the purpose of this statute is "to benefit American materialmen who supply necessaries to vessels." Defendants' S/J Motion at 2 (quoting *Tramp Oil & Marine, Ltd. v. M/V Mermaid I*, 743 F.2d 48, 51 (1st Cir. 1984)). The Defendants correctly point out that Stewart did not herself supply necessaries to the Vessel; however, it does not follow (as they next assert) that she therefore has no maritime lien. *See id*.

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[15] The Plaintiffs qualify this statement, admitting that no date certain was agreed for payment but denying that interest and rent were terms of the owner's agreement to sell the Vessel. *See* Plaintiffs' Opposing SMF ¶ 14; Stewart Dep. at 18.
[16] The Complaint indicates that the Plaintiffs together assert a maritime lien in the amount of $65,091.41. *See* Complaint ¶ 8.
[17] Although the Defendants frame this issue as one of "standing," *see* Defendants' S/J Motion at 1, the thrust of their argument is that Stewart does not, as a substantive legal matter, have either a maritime lien in the Vessel or any contractual relationship with the Defendants, *see generally id*. Stewart meets "the constitutional standing requirements of Article III: she alleges an actual injury, the injury can fairly be traced to the challenged conduct, and the injury can be redressed by the declaratory, injunctive, and monetary relief requested." *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 47 n.7 (1st Cir. 2000).

As the Plaintiffs point out, *see* Plaintiffs' Memorandum in Opposition to Defendant's [sic] Motion for Partial Summary Judgment ("Plaintiffs' S/J Opposition") (Docket No. 37) at 2-3, the First Circuit has embraced a corollary to section 31342 known as the "Rule of Advances":

> [W]e believe that advances that are made for the purpose of allowing a vessel to purchase items covered by § 971 [predecessor to 46 U.S.C. § 31342] give rise to a maritime lien. It is clear that advances made to allow a vessel to discharge lien claims acquire the status of the liens discharged, and we believe it follows that an advance that is made with the purpose of permitting the vessel to purchase supplies and other necessaries must also give rise to a maritime lien.

Universal Shipping, Inc. v. The Panamanian Flag Barge, 563 F.2d 483, 484 (1st Cir. 1976) (citations omitted); *see also, e.g., Tramp Oil & Marine, Ltd. v. M/V Mermaid I*, 805 F.2d 42, 45 (1st Cir. 1986) ("[T]he rule of advances has three significant requirements: (1) that the money be advanced to a ship, (2) that it be advanced on the order of the master or someone with similar authority, and (3) that the money be used to satisfy an outstanding or future lien claim.").

In response, the Defendants contend that Stewart falls short of meeting the first two of the three requisites for the application of the Rule of Advances. *See* Defendants' S/J Opposition at 2-4. Alternatively, they assert that her bid to enforce a maritime lien fails inasmuch as she does not qualify as a "stranger to the vessel." *See id*. at 4-6. I address each of these arguments in turn, finding none to have merit:

1. Rule of Advances/Money Advanced to Ship: The Defendants first argue that the evidence shows that Stewart relied on the personal credit of her boyfriend, Lush, rather than extending credit to the vessel. *See id*. at 2-3. They underscore the undisputed fact that Stewart's agreement to lend money for Vessel repairs was with Lush. *See id*. Nonetheless, as the Defendants recognize, *see id*. at 2, the party challenging a maritime lien bears the burden of overcoming a presumption that service was supplied on the

credit of the vessel, *see, e.g., Farrell Ocean Servs., Inc. v. United States*, 681 F.2d 91, 93 (1st Cir. 1982). The burden is heavy; "[i]t is not enough . . . to show that the supplier relied in part on the credit of the owner's agent or the owner." *Id*. at 93-94. Rather, "[t]he party entitled to the lien must have taken *affirmative* actions that manifest a clear intention to forego the lien." *Id*. at 94 (emphasis in original); *see also, e.g., Equilease Corp. v. M/V Sampson*, 793 F.2d 598, 606 (5th Cir. 1986) ("To meet this burden, evidence must be produced that would permit the inference that the supplier purposefully intended to forego the lien. Because of the strong presumption in favor of a maritime lien, it is necessary that a party opposing the lien prove that the creditor . . . deliberately intended to look solely to the owner's personal credit and to forego the valuable privilege afforded it by law.") (citations omitted).

The Defendants adduce no evidence that Stewart took affirmative actions manifesting a clear intention to forgo a maritime lien. While it is clear that her agreement was with Lush, it is equally clear that in forwarding money to him and in paying certain suppliers directly, she deliberately advanced monies for provision of repairs and other necessaries to the Vessel. The fact that a supplier (or, in this case, a financier) contracts or deals with a person or entity other than the vessel or vessel owner does not in itself evidence an affirmative intention to waive a maritime lien against that vessel. *See, e.g., Ryan-Walsh, Inc. v. M/V Ocean Trader*, 930 F. Supp. 210, 221 (D. Md. 1996) ("[I]t is . . . clear, contrary to the claimant's position, that relying on an owner's or charterer's credit does not, standing alone, amount to the waiver of a maritime lien."); *Northern Shipping Co. v. M//V Tivat*, Civ. No. 85-2705, 1987 WL 28355, at *4 (E.D. Pa. Dec. 18, 1987) ("[A] long relationship of contracting with a charterer for the provision of services has no bearing on the analysis of whether the provider of services purposefully intended to forego its lien."). In short, the Defendants fail to overcome the presumption that Stewart advanced monies to the Vessel. She therefore satisfies the first of the three requisites of the Rule of Advances.

2. Rule of Advances/Money Advanced on Proper Authority: The Defendants next assert that with respect to one component of the repairs to the Vessel – the Shipyard work – the Shipyard did not perform its work on the order of the master or someone with similar authority but rather at the behest of Stewart, who admits that she was neither an owner nor an agent of the Vessel. *See* Defendants' S/J Opposition at 3-4. They reason that inasmuch as the Shipyard itself accordingly never had a valid maritime lien, Stewart could not have obtained such a lien when she stepped into its shoes and paid its debt. *See id*. The parties dispute whether Finley expressly authorized the Shipyard work; however, I agree with the Plaintiffs that nothing ultimately turns on this. *See* Plaintiffs' S/J Reply at [4]-[5]. A vessel's owner need not expressly authorize specific services or supplies to create a maritime lien. *See, e.g.*, *Tramp Oil*, 805 F.2d at 45 (for purposes of Rule of Advances, owner need not have made express request for advance so long as there is basis in record for implying such an order).

It is undisputed that (i) Finley knew Lush was performing repairs to the Vessel from October 2000 through January 2001 and authorized him to do so, (ii) Finley knew Stewart was financing those repairs and had no objection to her doing so, and (iii) the Shipyard performed repair work on the Vessel. Thus, there is basis for implying Finley's order (on behalf of Stables, Inc.) for the Shipyard work. In any event, even assuming *arguendo* that Finley cannot be fairly implied to have ordered the work, Lush can be. As captain of the vessel, entrusted with its management by its owner, and as a then agreed buyer in possession, Lush qualified as a person on whose authority an order creating a maritime lien could be placed. *See, e.g.*, 46 U.S.C. § 31341 ("Persons presumed to have authority to procure necessaries for a vessel include (i) the master and (ii) officers or agents appointed by the owner or by an agreed buyer in possession of the vessel."). There is no dispute that Lush knew about and approved the Shipyard work. That work thus properly was authorized for purposes of creation of a maritime lien.

3. Stranger to the Vessel: The Defendants finally argue that Stewart's maritime-lien claim fails because she is not a stranger to the Vessel. *See* Defendants' S/J Opposition at 4-6; *see also, e.g., Fulcher's Point Pride Seafood, Inc. v. M/V Theodora Maria*, 935 F.2d 208, 211 (11th Cir. 1991) ("Joint venturers cannot hold maritime liens because they are not 'strangers to the vessel.'"); *Medina v. Marvirazon Compania Naviera, S.A.*, 533 F. Supp. 1279, 1288 (D. Mass. 1982), *aff'd*, 709 F.2d 124 (1st Cir. 1983) ("[W]here a party who would otherwise have a maritime lien has been held not entitled to it because of the relation in which he stood to the vessel, he was either (1) a real part owner of her, or (2) occupied a fiduciary relation towards her and her owners, or (3) dealt with himself on her account.") (citation and internal quotation marks omitted).[18] They point out that Stewart (i) represented herself, in a Shipyard customer information sheet, as duly authorized to bind the vessel and its owner, (ii) was the girlfriend of the Vessel's captain and agreed to invest approximately $40,000 in the Vessel, (iii) had a direct relationship with one of the vendors, (iv) wrote checks labeled "L.S. Stewart DBA Fishing Vessel," and (v) engaged in written and telephonic communications with the Defendants regarding the agreement to purchase the Vessel. *See* Defendants' S/J Opposition at 5-6.

The Defendants seemingly do not argue, nor could a trier of fact reasonably find, that Stewart was a part owner of the Vessel, had any fiduciary relationship with the Vessel or its owner or engaged in self-dealing on the Vessel's account. *See id*.[19] Instead, the Defendants suggest that Stewart had a personal

[18] For good measure, the Defendants contend that Lush likewise does not qualify as a stranger to the Vessel. *See* Defendants' S/J Opposition at 6. Inasmuch as neither side has moved for summary judgment as against Lush with respect to Count I, I ignore this argument.

[19] Stewart's assertion in the Complaint that she was a party to the agreement to purchase the Vessel, *see* Complaint ¶¶ 10-32, arguably is inconsistent with her argument that she was a stranger to the Vessel; however, those allegations do not constitute evidence for purposes of summary judgment, and in any event a party has a right to plead alternative or seemingly inconsistent claims, *see, e.g., In re Hemingway Transport, Inc.*, 993 F.2d 915, 932 n.22 (1st Cir. 1993) ("A party may set forth two or more statements of a claim or defense alternatively or hypothetically regardless of consistency.") (citations, internal punctuation and emphasis omitted).

financial stake in the Vessel and some degree of control over it, such that Stewart and Lush "may be considered 'joint venturers' with regard to" the Vessel. *See id*. at 6 & n.1. While there is no hard-and-fast test to discern the existence of such a joint venture, the following have been identified in the context of maritime liens as important elements: (i) intention to create a joint venture, (ii) joint control or joint right of control, (iii) joint proprietary interest in the subject matter of the venture, (iv) right to share in the profits and (v) duty to share in the losses. *See, e.g., Fulcher's Point*, 935 F.2d at 211. On the cognizable evidence, no reasonable trier of fact could find that Stewart was a joint venturer with Lush. It is undisputed that Stewart did not participate in the management or control of the Vessel. There is no evidence that she and Lush intended to create a joint venture or that she had either a right to share in the profits or a duty to share in the losses of any such purported venture. Nor can such an inference reasonably be drawn merely from her status as Lush's girlfriend. She accordingly was a "stranger to the vessel" rather than a quasi-owner in the sense contemplated by the caselaw. *Compare, e.g., Sasportes v. M/V Sol de Copacabana*, 581 F.2d 1204, 1209 (5th Cir. 1978) ("[W]hen the seas get rough one who looks, thinks, acts, and profits like an owner cannot retreat to the relatively safe harbor of a maritime lienor, who of course has a claim against the ship itself."); *Cantieri Navali Riuniti v. M/V Skyptron*, 621 F. Supp. 171, 186 (W.D. La. 1985), *aff'd in part, remanded on other grounds*, 802 F.2d 160 (5th Cir. 1986) ("It is well-settled law that a vessel owner, part owner, or joint venturer cannot hold a maritime lien on the vessel in which he enjoys such an interest. More particularly, a joint venturer cannot hold a maritime lien because he is not a 'stranger to the vessel' but occupies a position akin to that of an owner.") (citations omitted); *The Frank Brainerd*, 3 F.2d 664, 665 (D. Me. 1925) ("The reason for the ["stranger to the vessel"] rule is evident: A part owner owes a part of a stranger's bill, and, where there are insufficient funds, the part owner should not be entitled to take the funds from a stranger for the benefit of the part owners.").

In short, Stewart meets the requisites of the Rule of Advances: the monies in question were (i) advanced to the Vessel, (ii) advanced on the express or implicit authority of Finley or Lush, and (iii) used to satisfy future lien claims. Despite Stewart's dealings with the Vessel, she remained a "stranger" to it and is not barred from enforcing her maritime lien on that account. The Defendants fail to generate a triable issue whether certain of the monies in question are properly attributable to Vessel repairs. Accordingly, the court should grant the Plaintiffs' motion and deny that of the Defendants for summary judgment as to Count I, entitling Stewart to enforce her maritime lien in the full amount requested ($38,562.44).

B. Counts II-III: Contract (Stewart)

In Count II of their complaint, the Plaintiffs allege that (i) they entered into an agreement with Stables, Inc. to purchase the Vessel for $90,000 minus the cost of repairs noted in the Monroe survey, (ii) they contributed approximately $38,030 in labor and materials to the Vessel repairs and Stewart paid $5,000 toward the purchase price, (iii) Stables, Inc. has refused to sell the Vessel for the agreed amount, and (iv) based on information and belief, Stables, Inc. has agreed to sell the Vessel to a third party for $150,000. *See* Complaint ¶¶ 10-19.[20] They seek a decree awarding them $103,030 – an amount equal to the value of their contributions ($43,030) plus the increase in value of the Vessel over the contract price of $90,000 ($60,000). *See id*. at 5.

The Plaintiffs allege in Count III of their complaint, *inter alia*, that (i) there is no comparable fishing vessel in the State of Maine for sale on the same terms and conditions as were agreed to with respect to the Vessel, (ii) they cannot afford to buy such comparable vessels as are available for sale, (iii) all or substantially all of the value of the Vessel is the result of efforts they made to fish, manage, operate, repair

[20] In several of paragraphs of Counts II and III, the Complaint refers to "Plaintiff," singular, rather than "Plaintiffs," plural, (*continued on next page*)

and maintain it, and (iv) monetary compensation is inadequate to permit them to purchase a comparable fishing vessel, as a result of which they seek a decree ordering Stables, Inc. to sell them the Vessel for the agreed price. *See id*. ¶¶ 28-32.

The Defendants seek summary judgment as against Stewart with respect to Counts II and III on the ground that it is undisputed that she had no arrangement or agreement whatsoever with Finley or the Defendants. *See* Defendants' S/J Motion at 2. The Plaintiffs concede the point but assert that Stewart yet has a non-contract-based unjust-enrichment claim that would survive were her maritime lien claim dismissed. *See* Plaintiffs' S/J Opposition at [3]-[4]. The Defendants rightfully rejoin that the Plaintiffs never pleaded such a claim nor moved to amend their pleadings to add it. *See* Defendants' S/J Reply at 1-2; *see generally* Complaint; Docket. Nor do the Plaintiffs – even now – move to amend to add this cause of action. *See* Plaintiffs' S/J Opposition at [3]-[4]. As a result, it is not cognizable, and the Defendants' motion for summary judgment against Stewart as to Counts II and III should be granted.[21]

C. Counts II-III: Contract (Statute of Frauds)

The Defendants finally invoke the Statute of Frauds, 33 M.R.S.A. § 51, in seeking summary judgment against both Lush and Stewart as to Counts II and III. *See* Defendants' S/J Motion at 2-3. The Statute of Frauds provides, in relevant part, that "[n]o action shall be maintained . . . [u]pon any agreement

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see Complaint ¶¶ 15-18, 22-29, 31; however, inasmuch as appears, both Plaintiffs press these claims.

[21] Even assuming *arguendo* that the Plaintiffs' opposition to the Defendants' motion for summary judgment could be construed as a motion to amend their complaint pursuant to Federal Rule of Civil Procedure 15(a) to add an unjust-enrichment cause of action, I would recommend its denial. The Defendants plausibly complain that they were apprised of the existence of this claim for the first time on summary judgment, when it was too late to undertake discovery necessary to confront it. *See* Defendants' S/J Reply at 1-2. The First Circuit has observed that "[t]he further along a case is toward trial, the greater the threat of prejudice and delay when new claims are belatedly added." *Executive Leasing Corp. v. Banco Popular de Puerto Rico*, 48 F.3d 66, 71 (1st Cir. 1995) (citation and internal quotation marks omitted). The contours of prejudice become particularly apparent in cases, such as this, in which a motion to amend comes after discovery has closed and summary-judgment motions have been filed. *See, e.g., Torres-Rios v. LPS Lab., Inc.*, 152 F.3d 11, 16 (1st Cir. 1998); *Grant v. News Group Boston, Inc.*, 55 F.3d 1, 6 (1st Cir. 1995); *Carter v. Supermarkets Gen. Corp.*,
(*continued on next page*)

that is not to be performed within one year from the making thereof . . . unless the promise, contract or agreement on which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or by some person thereunto lawfully authorized[.]" 33 M.R.S.A. § 51(5).

As the Defendants point out, *see* Defendants' S/J Motion at 2-3, it is undisputed that the agreement to purchase the Vessel was not reduced to a writing of any kind and was not expected to be performed within one year of its making. It thus falls within the Statute of Frauds. The Plaintiffs nonetheless argue that two exceptions pertain, based on (i) partial performance and (ii) waiver by admission of the existence of the agreement. *See* Plaintiffs' S/J Opposition at [4]-[7].

As the Law Court has articulated the part-performance doctrine, which is grounded in principles of equitable estoppel: "After having induced or knowingly permitted another to perform in part an agreement, on the faith of its full performance by both parties and for which he could not well be compensated except by specific performance, the other shall not insist that the agreement is void." *Landry v. Landry*, 641 A.2d 182, 183 (Me. 1994) (citations and internal quotation marks omitted); *see also, e.g., Great Hill Fill & Gravel, Inc. v. Shapleigh*, 692 A.2d 928, 930 (Me. 1997) (describing *Landry* part-performance doctrine as "based on principles of equitable estoppel"). With respect to waiver by admission, a party "may waive the protection of the statute [of frauds], admit verbal evidence of the contract and become bound by it." *Mercier v. Town of Fairfield*, 628 A.2d 1053, 1055 (Me. 1993) (citation and internal quotation marks omitted).

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684 F.2d 187, 192 (1st Cir. 1982), *disagreed with on other grounds, Burnett v. Grattan*, 468 U.S. 42, 46 n.9 (1984).

Nonetheless, as the Defendants suggest, there is an important caveat: Both exceptions presuppose the existence of an otherwise valid and enforceable (albeit oral) agreement. *See* Defendants' S/J Reply at 2-3; *Mercier*, 628 A.2d at 1055 ("[A] party's admission of all the facts necessary to establish an oral agreement will render a contract otherwise within the statute of frauds enforceable against that party."); *Bigelow v. Bigelow*, 49 A. 49, 51 (Me. 1901) (first considering, in context of claim that part performance took agreement out of Statute of Frauds, whether contract was made); *see also, e.g., Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1281 n.13 (1st Cir. 1993) (noting general contract-law principles that "a contract must be reasonably certain to be enforceable" and "[a]n estoppel claim similarly must be supported by a sufficiently definite promise") (citations and internal quotation marks omitted); *Rosenthal v. National Produce Co.*, 573 A.2d 365, 370 (D.C. 1990) ("A contract must be sufficiently definite as to its material terms (which include, *e.g.*, subject matter, price, payment terms, quantity, quality, and duration) that the promises and performance to be rendered by each party are reasonably certain. . . . If the agreement be so vague and indefinite that it is not possible to collect from it the intention of the parties, it is void because neither the court nor jury could make a contract for the parties. Such a contract cannot be enforced in equity nor sued upon in law.") (citations and internal quotation marks omitted).

In this case, there is no dispute that Finley (on behalf of Stables, Inc.) agreed to sell the Vessel to Lush for $90,000, and Lush agreed to buy it for that amount. Nonetheless, I agree that for lack of consensus as to all material terms, no enforceable contract was created. As the Defendants observe, *see* Defendants' S/J Reply at 3, the evidence discloses that no agreement (oral or otherwise) was reached with respect to (i) whether fishing permits or licenses were included in the deal, (ii) time for payment, (iii) interest on any "note" being held by the Defendants or (iv) rent for the Vessel.

"To establish a legally binding agreement the parties must have mutually assented to be bound by all its material terms; the assent must be manifested in the contract, either expressly or impliedly; and the contract must be sufficiently definite to enable the court to determine its exact meaning and fix exactly the legal liabilities of the parties." *Stanton v. University of Me. Sys.*, 773 A.2d 1045, 1050 (Me. 2001) (citation and internal quotation marks omitted). "[C]ourts have some latitude in supplying reasonable terms where the parties to a contract have failed to do so." *Cote v. Department of Human Servs.*, 837 A.2d 140, 142 n.2 (Me. 2003). "However, before a court supplies any terms, it must find that the parties mutually assented to an agreement that, at a minimum, contains terms that enable the court to allocate liability." *Id*.

Here, in what amounted to a deal that Stables, Inc. would help finance Lush's purchase of the Vessel, no agreement was reached with respect to the manner or timing of payment of the balance due. In the absence of any definite agreement as to payment parameters, the court is at a loss to determine whether and when Lush should be held to have breached the agreement by failure to tender payment, or, conversely, whether and when Stables, Inc. should be held to have breached the agreement by wrongful repossession of the Vessel for non-payment. *See, e.g., Jordan-Milton Mach., Inc. v. F/V Teresa Marie, II*, 978 F.2d 32, 35 (1st Cir. 1992) (applying Maine law; stating, "even if Peacock's statement, 'We can do this deal," could be construed as creating an agreement to provide financing, this agreement would be unenforceable as being too vague and uncertain to constitute an enforceable contract. There was not any agreement as to the term of the loan (i.e., when repayment was to begin and end); there was no agreement as to the amount to be repaid each month; nor was there an agreement as to the rate of interest to be charged by a lender other than Caterpillar Financial Services."); *Bristol Sav. Bank v. Cellino*, No. CV91 0504535S, 1993 WL 197872, at *3 (Conn. Super. Ct. June 2, 1993), *aff'd*, 642 A.2d 756 (Conn. App. Ct. 1994) (holding

alleged agreement by bank to convert construction loan into permanent mortgage too vague and indefinite to be enforceable when it did not contain basic provisions such as rate of interest, term, amount of time allowed for payment or amount of monthly payments).

Inasmuch as the oral agreement in issue (i) falls within the Statute of Frauds and (ii) is in any event too indefinite to be enforceable, the Defendants are entitled to summary judgment as to Counts II and III. *See, e.g., Furtak v. Moffett*, 671 N.E.2d 827, 830 (Ill. App. Ct. 1996) (alleged oral agreement was incapable of being performed within a year and thus unenforceable pursuant to the statute of frauds and, alternatively, too vague to be enforceable); *Trimble v. Wisconsin Builders, Inc.*, 241 N.W.2d 409, 415-16 (Wis. 1976) (agreement to sell real estate failed to satisfy requirements of statute of frauds and was, in any event, so indefinite that it failed to spell out essential commitments and obligations of parties).[22]

IV. Conclusion

For the foregoing reasons, I recommend that the court **GRANT** the Plaintiffs' motion for summary judgment in favor of Stewart as to Count I, permitting her to enforce a maritime lien against the Vessel in the amount of $38,562.44 plus prejudgment interest, **DENY** the Defendants' cross-motion for summary judgment against Stewart as to Count I, and **GRANT** the Defendants' motion for summary judgment against both Plaintiffs as to Counts II and III of the Complaint.

NOTICE

[22] Stewart seeks interest – which I construe to mean prejudgment interest – as well as costs. *See* Plaintiffs' S/J Motion at 1-2. Should the court agree with my recommended disposition of Count I, I further recommend that the court award prejudgment interest to compensate her for the time value of her maritime-lien money. *See, e.g., Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 444 (1st Cir.1991) ("Prejudgment interest on admiralty claims is generally allowed on claims for prejudgment economic harm as compensation for the use of funds to which the plaintiff was ultimately judged entitled, but which the defendant had the use of prior to judgment.") (citation and internal quotation marks omitted). Stewart's request for costs is premature and thus beyond the scope of this recommended decision. I note that requests for costs should be made in accordance with Local Rule 54.3.

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 10th day of February, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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Counter Claimant

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TERRI AND RUTH F/V, *In Rem*
O.N. 504536

V.

Counter Defendant

ERIC LUSH

LINDA STEWART